3-12-2008

State v. Bennett Appellant's Brief 1 Dckt. 34066

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. WILLIAM LYNN BENNETT, Defendant-Appellant.	)	NO. 34066 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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Nature of the Case

This case is about a business transaction gone awry, leading, ultimately, to Mr. Bennett being imprisoned for an alleged breach of contract. In 2004, Mr. Bennett contracted with Mr. LeFave to purchase Mr. LeFave's travel trailer. When Mr. Bennett moved out of State without making all of the payments, Mr. LeFave reported the trailer missing to the police and the criminal case ensued. Mr. Bennett contends that the State failed to provide sufficient evidence that he was guilty of grand theft because it failed to demonstrate that Mr. Bennett unlawfully took the property, that Mr. LeFave owned the trailer when it was allegedly stolen, and that Mr. Bennett possessed the requisite intent to deprive the owner of the trailer or appropriate the trailer. Mr. Bennett also contends the district court erred when it ordered a separate concurrent sentence for the persistent violator enhancement.

Statement of the Facts and Course of Proceedings

In October 2004, Mr. Bennett entered into a verbal contract with Mr. LeFave to purchase Mr. LeFave's travel trailer. (Tr., p.28, L.12 – p.30, L.23, p.96, L.13 – p.97, L.9.)[1] Mr. Bennett agreed to make payments to Mr. LeFave for the trailer, and Mr. LeFave agreed to bring the trailer to Mr. Bennett's friend's property where Mr. Bennett was going to be staying. (Tr., p.28, L.12 – p.30, L.23, p.96, L.13 – p.97, L.9.) Mr. Bennett made at least one payment toward the trailer; however, he never

[1] For ease of reference, Mr. Bennett has cited the main transcript as "Tr.," the preliminary hearing transcript as "Prelim. Hr.," and the transcript of the opening and closing arguments as "Supp. Tr.,"

made full payment for the trailer.[2] (Tr., p.73, L.1 – p.75.) Mr. Bennett eventually moved to Ferndale, Washington, taking the travel trailer with him. (Tr., p.104, Ls.5-22.) After moving to Ferndale, Mr. Bennett contacted Mr. LeFave to provide him with his new information. (Tr., p.104, Ls.5-22.)

Mr. LeFave subsequently contacted law enforcement to pursue criminal actions against Mr. Bennett and to have the trailer registered as stolen. (Tr., p.49, L.23 – p.50, L.15.) Mr. Bennett was charged by Information with Grand Theft for wrongfully taking Mr. Lafave's travel trailer on or about October 30, 2004, violating Idaho Code §§ 18-2403(1) and 18-2407(1)(b). (R., pp.20-21.) An Information Part II was subsequently filed by the State charging Mr. Bennett with being a persistent violator. (R., pp.32-33.) The case eventually proceeded to trial.

At trial, Mr. LeFave testified that in 2004 he owned a 1962 travel trailer, for which he had paid a little under $400. (Tr., p.20, Ls.4-14.) He testified that when he purchased it, the trailer was in poor condition, but he rebuilt the inside by installing new paneling, building a closet, moving the cooking facilities to the back, and making it wheelchair accessible. (Tr., p.20, Ls.4-14, p.22, L.23 – p.23, L.2.) Mr. LeFave eventually decided to sell the trailer. (Tr., p.28, Ls.2-4.) Mr. LeFave testified that he advertised the trailer for sale at $1800. (Tr., p.28, Ls.5-11.) Mr. Bennett contacted Mr. LeFave to purchase the trailer, and Mr. LeFave met Mr. Bennett at the T and A Truck Stop to discuss the trailer and to confirm that this was where Mr. Bennett was working. (Tr., p.28, Ls.12-18.) According to Mr. LeFave, he agreed to sell the trailer to Mr. Bennett for $1,500, he agreed to tow the trailer to where Mr. Bennett would be staying, and he agreed that Mr. Bennett could make payments on the trailer rather than

[2] The number of payments and the amount outstanding was disputed at trial as discussed below.

pay the $1,500 up front. (Tr., p.28, L.21 – p.30, L.2.) Mr. LeFave testified that after he towed the trailer to the specified property, he put a chain on the trailer and a "tongue hitch lock system," and he told Mr. Bennett "if it would be moved, I would come out and move it personally so I would know where it was at all times." (Tr., p.29, L.24 – p.30, L.6, p.30, Ls.5-17.) Under the terms of the agreement, once Mr. Bennett finished paying for the trailer, he would receive the title, according to Mr. LeFave. (Tr., p.30, Ls.20-23.)

Mr. LeFave also testified that Mr. Bennett was not even required to make a down payment at the time Mr. Bennett received the trailer, instead he told Mr. Bennett "We'll just work on a few months to let you get build up, then we'll do it." (Tr., p.29, Ls.4-12.) Mr. LeFave testified that during the course of his dealing with Mr. Bennett, he never received any payments from Mr. Bennett, although Mr. LeFave's wife had received one payment. (Tr., p.31, Ls.9-16.)[3] His wife later testified that Mr. Bennett came to her place of work and made a payment for an uncertain amount, possibly $200-$300. (Tr., p.73, L.1 – p.75, L.9.) Mrs. LeFave also testified that she was present when the agreement was originally entered into at the T and A Truck Stop, but she could not remember if any money was exchanged at that time or the terms of the agreement. (Tr., p.75, L.25 – p.77, L.20.)

Mr. LeFave eventually became aware the trailer had been moved when he received a phone call from "Mike or Mike's wife"[4] stating the trailer was not there anymore. (Tr., p.31, Ls.7-12.) Mr. LeFave went to the lot to investigate, looked over the

[3] At the preliminary hearing, Mr. LeFave testified that he had never received any payments from Mr. Bennett, never mentioning the payment to Mr. LeFave's wife. (Tr., p.58, L.11 – p.66, L.4; Prelim. Hr. Tr., p.11, L.5 – p.12, L.5.)

fence from the outside, did not see the trailer, and then "went home and proceeded to take the legal means into it." (Tr., p.32, Ls.15-17.)[5] According to Mr. LeFave, several months later he received a phone call from Mr. Bennett stating if he sent him the title, he would send him $1,000 and "[i]f I got the police involved, he would burn it." (Tr., p.33, L.5 – p.34, L.3.) After contacting law enforcement, Mr. LeFave decided to send Mr. Bennett a certified letter telling him to send the cash first and then he would send the title. (Tr., p.34, Ls.5-8.)[6] He determined what information needed to go into the letter after contacting Officer Jones in reference to the travel trailer. (Tr., p.49, L.23 – p.50, L.16.)[7] Mr. LeFave also testified that he knew where to send the letter because Mr. Bennett had given Mr. LeFave his address over the phone when he had called. (Tr., p.46, L.19 – p.47, L.7.) Unfortunately, Mr. Bennett never received this letter because it was returned to Mr. LeFave stating it had not been picked up, possibly because it was addressed to "Mr. Betten" or "Mr. Bittin" rather than Mr. Bennett. (Tr., p.34, Ls.5-20, p.36, Ls.16-23, p.47, Ls.21-22; State's Exhibit 2; State's Exhibit 3.)

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[4] It is not clear from the testimony at trial, who exactly "Mike" is, although no objection was ever raised to referencing his name and the State never asked any questions to clarify the identity.

[5] Notably, this testimony is contradictory to Mr. LeFave's testimony a few moments later at trial when he testified that he and "Mike" went into the backyard to look around and found the upper part of the lock system he placed on the hitch. (Tr., p.32, L.21 – p.33, L.2.) This is also contradictory to Mr. LeFave's later testimony that Mr. Bennett called him several months later asking for the title and, after that call, Mr. LeFave pursued criminal charges. (Tr., p.33, L.5 – p.34, L.3.)

[6] The actual letter allegedly sent made no mention of exchanging money for the title, stating on "This letter serves notice that 10 days after receipt, MY trailer vin A98323478 will be entered N.C.I.C. as a stolen vehicle! If you have any Questions you can contact Officer Jones with the Boise Police Department." (State's Exhibit 3.) Notably, there were actually two letters contained in State's Exhibit 3 with very similar language, one of which was allegedly sent to Mr. Bennett (or Betten, as the envelope was addressed). (State's Exhibit 2; State's Exhibit 3.) Mr. LeFave testified that he could not remember which of the two letters were actually sent to Mr. Bennett. (Tr., p.35, Ls.16-23.) Because the language is almost identical and the exhibit was admitted without objection, counsel on appeal, has quoted the language from the first letter. (State's Exhibit 3; See Tr., p.36, Ls.9-13.)

[7] The demand letter, which purports to reference the VIN #, actually references the title number A98323478. (State's Exhibit 1; State's Exhibit 3; Tr., p.53, Ls.3-24.)

According to Mr. LeFave he also traveled with "Mike" to the address on the letter and discovered that Mr. Bennett was no longer at the address. (Tr., p.37, Ls.11-19.)

At trial Carolyn Ellinger confirmed that she had allowed Mr. Bennett to park the travel trailer on her property in October/November 2004. (Tr., p.82, Ls.16-23.) She testified that although the trailer was chained to a fence it was not locked. (Tr., p.83, Ls.8-16.) Ms. Ellinger testified that a couple months later, Mr. Bennett advised Ms. Ellinger that he would be moving. (Tr., p.83, L.24 – p.84, L.12.) He had obtained a second job helping a handicapped person and he would be living there with the trailer (Tr., p.83, L.24 – p.84, L.7.) Later that evening, Mr. Bennett and the trailer were gone. (Tr., p.84, Ls.9-12.)

At trial, Mr. Bennett testified that the sign on the trailer advertised the price as $1000 and that he had agreed to pay Mr. LeFave $850 for it. (Tr., p.96, Ls.13-20.) Mr. Bennett paid $150 on the day the transaction was entered into and he made payments every two weeks after that when he received his check. (Tr., p.97, Ls.1-9.) Mr. Bennett testified that he made payments of $150 on 11/1/2004 and $300 on 11/15/04 to Mr. LeFave at the truck stop, and $150 on 11/17/04 to Mrs. LeFave at her place of work. (Tr., p.98, Ls.15-20, p.99, L14 – p.100, L.6, p.100, L.23 – p.101, L.25.) Mr. Bennett testified that when he made the last payment to Mrs. LeFave, she said the title had been ordered and it was agreed when the title came in he would make the final payment in exchange for the title. (Tr., p.102, Ls.11-25.) Mr. Bennett also testified that when he started his second job, Mr. LeFave moved the trailer for him from Ms. Ellinger's property to the new location where he would be working and Mr. Bennett advised him at that time he might be moving again. (Tr., p.110, L.18 – p.111, L.16.) Finally,

Mr. Bennett testified that when he moved to Ferndale, Washington he contacted Mr. LeFave with his address and inquired again about the title. (Tr., p.104, Ls.5-22.)

Mr. Bennett was ultimately convicted by the jury of grand theft and stipulated that he was a persistent violator. (Tr., p.145, L.4 – p.149, L.12; R., pp.46, 50.) Mr. Bennett filed a *pro se* Notice of Appeal following the jury's verdict. (R., pp.51-57.) Counsel for Mr. Bennett also filed a Motion for Judgment of Acquittal arguing that "[t]he inculpatory evidence presented on the material element of value was so insubstantial that jurors could not help but have a reasonable doubt as to the proof of that element." (R., pp.58-59, 62-64.) At the hearing on the motion, counsel for Mr. Bennett argued that because of the inconsistencies in Mr. LeFave's testimony and the fact that Mr. LeFave admitted his memory of the events was only about 85%, there was insufficient evidence to demonstrate the value of the trailer. (Tr., p.154, L.12 – p.160, L.23.)[8] The district court took the matter under advisement and issued a Memorandum Decision on Defendant's Motion for Judgment of Acquittal, denying the motion. (Tr., p.160, L.24 – p.161, L.4; R., pp.65-70.)

Mr. Bennett was eventually sentenced to concurrent sentences of eight years, with one and a half years fixed, for grand theft and for being a persistent violator. (R., pp.75-77.)[9] Mr. Bennett then filed a timely *pro se* Amended Notice of Appeal and Notice of Appeal from the district court's Judgment of Conviction. (R., pp.79-89.) Mr. Bennett also filed a timely Rule 35 motion requesting his sentence be reduced to

[8] Because this Court will not substitute its views regarding the credibility of witness and the weight of the evidence on appeal, and this would be a question of fact regarding the jury to determine the credibility of the witnesses and weight of the evidence, this issue is not being pursued on appeal. *State v. Crawford,* 130 Idaho 592, 595, 944 P.2d 727, 730 (Ct. App. 1997).

[9] This has subsequently been corrected by the department of corrections to properly reflect one sentence.

three years, with one a half years fixed. (R., pp.91-110.) The district court denied Mr. Bennett's Rule 35 request. (R., pp.111-114.)

ISSUES

1. Was the evidence presented at trial insufficient to support the jury's verdict finding Mr. Bennett guilty of Grand Theft?

2. Did the district court err in ordering a separate concurrent sentence for the persistent violator enhancement?

ARGUMENT

I.

The Evidence Presented At Trial Was Insufficient To Support The Jury's Verdict Finding Mr. Bennett Guilty Of Grand Theft

A. Introduction

At trial, the State failed to present sufficient evidence to prove that Mr. Bennett committed the crime of grand theft. Mr. Bennett contends the State failed to establish several of the elements required to establish Mr. Bennett had committed theft. The State failed to prove that Mr. Bennett took the trailer from Mr. LeFave, that Mr. LeFave had a greater ownership interest in the trailer than Mr. Bennett, and that Mr. Bennett intended to deprive the owner or appropriate the trailer by moving it.

B. The Evidence Presented At Trial Was Insufficient To Support Mr. Bennett's Conviction Of Grand Theft

In this case, the State failed to provide sufficient evidence to prove Mr. Bennett was guilty of grand theft because it failed to prove beyond a reasonable doubt that Mr. Bennett committed a theft by moving the trailer, which was already in his possession and which he had made at least one payment toward. An appellate court's review of the sufficiency of the evidence to support a conviction is limited in scope. *State v. Knutson,* 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 2001). The reviewing court will not set aside the judgment of conviction following a jury verdict, if "there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime

beyond a reasonable doubt." *State v. Crawford*, 130 Idaho 592, 594, 944 P.2d 727, 729 (Ct. App. 1997).

When reviewing the sufficiency of the evidence, the Court will conduct an independent review of the evidence in the record to determine whether a reasonable mind could conclude that each material element of the offense was proven beyond a reasonable doubt. *Willard,* 129 Idaho at 828, 933 P.2d at 117; *Knutson,* 121 Idaho at 104, 822 P.2d at 1001. The Court will not substitute its views for that of the jury when determining "the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence." *Crawford,* 130 Idaho at 595, 944 P.2d at 730. Furthermore, the Court will consider the evidence in the light most favorable to the prosecution. *Id.* In *State v. Mitchell*, 130 Idaho 134, 937 P.2d 960 (Ct. App. 1997), it was noted that, "[e]vidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proved." *Id.* at 135, 937 P.2d at 961.

This case is about a business transaction gone awry and the criminal proceedings that flowed from the breach of contract. In the context of criminal actions arising out of contractual obligations, there has evolved a tradition against enforcing civil contractual obligations through criminal proceedings. *State v. Jesser,* 95 Idaho 43, 50, 501 P.2d 727, 734 (1972); *State v. Henninger,* 130 Idaho 638, 642, 945 P.2d 864, 868 (Ct. App. 1997). This is reflected in the Idaho State Constitution, article I, section 15, which prohibits the "imprisonment for debt in this state except in cases of fraud." Idaho Const. art I, § 15. The reasons underlying this tradition include "the improbability of preventing honest insolvency by threat of prosecution, the danger of discouraging

healthy commercial risk-taking or of obtaining unjust convictions by hindsight, the futility of imprisoning a debtor unable to pay, and the concept that the seller or lender must select and accept his risks." *Jesser,* 95 Idaho at 50, 501 P.2d at 734; *Henninger,* 130 Idaho at 642, 945 P.2d at 868.

In *Henninger,* the Idaho Court of Appeals was faced with the question of whether the defendant had committed theft by unauthorized control as provided in I.C. § 18-2403(3), when the defendant failed to make payments on the installment contract for the pickup he purchased. *Henninger,* 130 Idaho at 640-42, 945 P.2d at 866-868. In making its determination that there was not substantial competent evidence to convict Mr. Henninger of the crime alleged, the Court noted that when Mr. Henninger drove the pickup away from the dealership he was the owner of the vehicle and his control was authorized. *Id.* at 641-42, 945 P.2d at 867-868. The Court went on to conclude that absent a more explicit expression by the legislature that it intended to abandon the customary separation of criminal law and civil contract enforcement, theft by unauthorized control was not intended "to encompass possession by a debtor who, by defaulting on a payment, has become contractually obligated to return the collateral to the creditor" or that it "intended the theft statute to be a mechanism that would aid the repossession efforts of secured creditors." *Id.* at 642, 945 P.2d at 868.

Furthermore, in *State v. Owen,* 129 Idaho 920, 935 P.2d 183 (Ct. App. 1997), the Court of Appeals was asked to determine the extent to which article I, section 15, of the Idaho Constitution, which prohibits criminal charges for the failure to pay a debt, applies when the defendant is charged with theft by deception and theft by false promise. *Id.* at 928-29, 935 P.2d at 191-92. The Court noted that this provision "is intended to prohibit

imprisonment over disputes which are contractual in nature." *Id.* at 928, 935 P.2d at 191. The Court cited *State v. Cochrane,* 51 Idaho 521, 6 P.2d 489 (1931), and found that these specific types of theft crimes were constitutional under *Cochrane* where they included "a component of dishonesty or falsehood" and thereby "advance the state's interest in preserving 'good morals and honest dealing.'" *Id.* at 929, 935 P.2d at 192 (quoting *Cochrane,* 51 Idaho at 527, 6 P.2d at 491.)

Here, the dispute was contractual in nature and Mr. Bennett was not charged with theft by deception, theft by false pretenses, or theft by unauthorized control like the cases above, but was simply charged with grand theft under the general portion of theft statute, and the instructions submitted to the jury only required the jury to find Mr. Bennett guilty of a general theft over $1,000. (*See* Jury Instructions Nos. 13, 17.) The elements of the crime of theft as charged in this case were:

1. On or about October 30, 2004
2. in the State of Idaho
3. the defendant William Lynn Bennett, wrongfully took property described as: at 1962 travel trailer,
4. from an owner, and
5. the defendant took the property with the intent to deprive an owner of the property or to appropriate the property.

(Jury Instruction No. 13.) The thrust of the State's case was that Mr. Bennett committed theft when he moved the trailer to Washington without Mr. LeFave's permission. (Supp. Tr., p.11, L.10 – p.12, L.16.) However, this theory fails to support Mr. Bennett's conviction of grand theft on the following three elements: (1) that Mr. Bennett wrongfully took the property, because the property was in Mr. Bennett's possession so it could not

be "wrongfully" taken by him; (2) that the property was taken from an owner, because Mr. Bennett had contracted with Mr. LeFave for the trailer and was ostensibly the owner of the trailer; and (3) that Mr. Bennett took the property with the intent to deprive the owner of the property or to appropriate the property, because Mr. Bennett did not have the requisite intent since he possessed and believed he owned or had an ownership interest in the trailer. Therefore, as discussed below, Mr. Bennett contends the State failed to establish the material elements of the crime in this case to support his conviction.

1. There Was Not Substantial Competent Evidence To Conclude That Mr. Bennett Wrongfully Took The Property, Because The Property Was Already Lawfully In His Possession

Idaho Code section 18-2402 defines obtaining property as bringing "about a transfer of interest or possession, whether to the offender or to another." *Id.* Here, this had already occurred lawfully when Mr. LeFave brought the travel trailer to the property where Mr. Bennett was living. (*See* Tr., p.29, L.24 – p.30, L.6.) Once Mr. LeFave dropped off the trailer at Ms. Elliger's property, the trailer was in Mr. Bennett's possession and was under his control to live in, to care for, etc. This is similar to *Henninger*, where the court found once the defendant drove off in the vehicle it was in his control. *Id.* at 641, 945 P.2d at 867. The court noted that under the terms of the agreement, the dealership had "no further right to possession except to the extent that it would be entitled to repossess the vehicle upon default by terms of the security agreement." *Id.*

However here, unlike *Henninger*, there was not even an agreement reserving the right for Mr. LeFave to repossess the vehicle upon default. (*See* Tr., p.28, L.21 – p.30,

L.2.) Although it was agreed that the physical title would not be given to Mr. Bennett until he made full payment, there was nothing specifying that Mr. LeFave had a right to enter the defendant's property and regain control of the trailer. (See Tr., p.28, L.21 – p.30, L.2.) To find that Mr. Bennett wrongfully took the trailer that was lawfully in his possession, would require that the owner of any vehicle still making payments to the creditor can be held liable for theft of vehicle if they quit making payments even though they lawfully obtained possession of the vehicle. *See Henninger,* 130 Idaho at 641-42, 945 P.2d at 867-68. Therefore, Mr. Bennett contends the State failed to provide sufficient evidence that he unlawfully took or obtained the trailer.

2. There Was Not Substantial Competent Evidence To Conclude That Mr. Bennett Took The Trailer From An Owner

The jury instructions further defined an "owner" as "any person who has a right to possession of such property superior to that of the defendant" in the jury instructions. (Jury Instruction No. 15.) Although the State argued at trial that this element was met because Mr. LeFave testified that he owned the trailer and the trailer was still titled in his name (Supp. Tr., p.12, Ls.2-4), Mr. Bennett submits that the evidence presented at trial was insufficient to establish that Mr. LeFave's interest in the trailer was not superior to that of Mr. Bennett's.

In *Jesser,* the court noted that under the uniform commercial code, "title is deemed to pass to the buyer at the time and place at which the seller completes his performance with to physical delivery of the goods, unless the parties explicitly agree otherwise." *Jesser,* 95 Idaho at 51, 501 P.2d at 735 (citing I.C. § 28-2-401(2) which currently states that "[u]nless otherwise explicitly agreed title passes to the buyer at the

time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place."). Here, Mr. LeFave delivered the trailer to Mr. Bennett at the beginning of this transaction; therefore, title had passed at that point and Mr. Bennett continued to make payment to Mr. LeFave after this occurred. (*See*, Tr., p.28, L.21 – p.30, L.2.) By accepting partial payment for the trailer and moving the trailer to Mr. Bennett's property, Mr. LeFave was transferring ownership of the trailer to Mr. Bennett.

Additionally, in *Henninger,* the Court found that although it could legitimately be argued that a party holding a security interest in a property becomes the "owner" upon the defendant's default, this result was likely not the intention of the legislature because it would render anyone who misses a payment on a secured credit purchase guilty of criminal conduct. *Id.* at 641, 945 P.2d at 867. Although here there was no evidence presented at trial establishing that Mr. LeFave even had a security interest in the trailer, even if he did, Mr. Bennett's default does not render Mr. LeFave's ownership interest superior to that of Mr. Bennett. (*See* Tr., p.28, L.21 – p.30, L.2.) Therefore, the State failed to establish that Mr. LeFave's ownership interest in the trailer was superior to Mr. Bennett's.

3. The State Failed To Prove That Mr. Bennett Wrongfully Took The Trailer With The Intent To Deprive The Owner Of The Property Or To Appropriate The Property

Finally, the State failed to prove that Mr. Bennett wrongfully took the trailer with the intent to deprive the owner of the property or to appropriate the property. (*See* Jury Instructions 13, 14). At trial, the State argued that this element was satisfied because

Mr. Bennett failed to pay for the trailer and because Mr. Bennett did not have permission to take the trailer. (Supp. Tr., p.12, L.5 – p.13, L.16.) However, both of these theories are misguided.

First, the failure to pay the debt is not enough to justify a conviction of theft absent some type of deception or fraud on the part of the defendant. *See State v. Compton,* 92 Idaho 739, 450 P.2d 79 (1969) (stating "a mere debtor-creditor relationship coupled with failure to repay does not in itself establish the commission of the crime.") If failure to pay was enough to meet this element, it would be exactly what article I, section 15, of the Idaho State constitution was designed to prevent because it would be incarcerating someone simply for failing to pay on an obligation or debt.

Furthermore, the State's theory that Mr. Bennett did not have permission to take the trailer and thereby deprived the owner of the property does not provide the requisite intent because by that point, Mr. Bennett already had lawful possession of the trailer and was the owner. (*See* Supp. Tr., p.12, L.5 – p.13, L.16.) The intent required to deprive the owner of his property "must exist at the time of the wrongful taking or stealing." *State v. Bassett,* 86 Idaho 277, 385 P.2d 246 (1963). *See also Jesser,* 95 Idaho at 51, 501 P.2d at 735. Here, as argued above, Mr. Bennett was lawfully in possession of the trailer once Mr. LeFave dropped the trailer off at the specified lot for his use. (*See* Section I(B)(1) supra.) Additionally, the State alleged the wrongful taking occurred when Mr. Bennett moved the trailer, not when he obtained possession of it. (Supp. Tr., p.12, L.5 – p.13, L.16.) Finally, as argued above in section I(B)(2), Mr. Bennett's ownership interest in the trailer was superior to Mr. LeFave's once the trailer was delivered. (*See* Section I(B)(2) supra.) Therefore, even if Mr. Bennett

possessed the requisite intent to deprive Mr. LeFave of the property when he moved the trailer, he already had lawful possession of the trailer and had a superior ownership interest. One with a superior ownership interest in property does not commit a crime by intending to deprive a non-owner, or lesser owner, of possession of that property. Therefore, the State failed to provide substantial competent evidence of this element.

Because the State failed to provide substantial competent evidence that Mr. Bennett wrongfully took the property in question, that Mr. Bennett's ownership interest was inferior to Mr. LeFave's, and that Mr. Bennett took the property with the intent to deprive the owner of the property or to appropriate the property, Mr. Bennett's conviction for grand theft cannot be sustained. Therefore his conviction for grand theft with a persistent violator enhancement should be vacated.

II.

The District Court Erred In Ordering A Separate Concurrent Sentence For The Persistent Violator Enhancement

I.C. § 19-2514 does not create a new crime, but rather provides for greater punishment for the underlying conviction. *State v. Lopez,* 108 Idaho 394, 395, 700 P.2d 16, 17 (1985). Therefore, separate sentences should not be imposed for both the crime and the persistent violator enhancement. *Id.* In *State v. Pierce,* 107 Idaho 96, 107, 685 P.2d 837, 848 (Ct. App. 1984), the district court ordered two separate concurrent sentences of thirty years for the underlying crime and the persistent violator enhancement. *Id.* On appeal, the Court found the district court erred in imposing concurrent sentences and ordered that the judgment be corrected to reflect one single sentence of thirty years. *Id.* Here, the district court ordered two separate distinct

sentences, and ordered them to be run concurrently. (R., pp.75-77.) However, the district court should have ordered one sentence for the crime charged in this case. Therefore, Mr. Bennett's separate concurrent sentence for the persistent violator enhancement should be vacated and the judgment corrected to reflect one single sentence.

CONCLUSION

Mr. Bennett respectfully requests that this Court vacate his conviction for grand theft with a persistent violator enhancement because there was insufficient evidence to support his conviction. Alternatively, he requests that this Court order that his judgment and commitment order be corrected to properly reflect a single sentence, rather than separate concurrent sentences for grand theft and persistent violator.

DATED this 12th day of March, 2008.

HEATHER M. CARLSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of March, 2008, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

WILLIAM LYNN BENNETT
INMATE # 16370
SICI
PO BOX 8509
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EVAN A. SMITH
Legal Secretary

HMC/eas